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Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH,  
Plaintiff/Appellee,

v.

JULIO I. MARTINEZ,  
Defendant/Appellant.

Case No. 20110015-CA

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**BRIEF OF THE APPELLANT**

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Appeal from convictions for Aggravated Assault Causing Serious Bodily Injury to Another, a Second Degree Felony in violation of Utah Code Ann. § 76-5-103(1)(A); Robbery, a Second Degree Felony, in violation of Utah Code Ann. § 76-6-301; two counts of Domestic Violence in the Presence of a Child, a Third Degree Felony, in violation of Utah Code Ann. § 76-5-109.1 and Interfering with Lawful Arrest, a Class B Misdemeanor, in violation of Utah Code Ann. § 76-8-305 in the Third District Court, State of Utah, the Honorable Deno Himonas, Judge, presiding.

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UTAH APPELLATE COURTS

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**NATURE OF THE PROCEEDINGS AND JURISDICTION**

Appeal from convictions for Aggravated Assault Causing Serious Bodily Injury to Another, a Second Degree Felony in violation of Utah Code Ann. § 76-5-103(1)(A); Robbery, a Second Degree Felony, in violation of Utah Code Ann. § 76-6-301; two counts of Domestic Violence in the Presence of a Child, a Third Degree Felony, in violation of Utah Code Ann. § 76-5-109.1 and Interfering with Lawful Arrest, a Class B Misdemeanor, in violation of Utah Code Ann. § 76-8-305 in the Third District Court, State of Utah, the Honorable Deno Himonas, Judge, presiding.

This court has jurisdiction pursuant to Utah Code Ann. § 78A-4-103(2)(e).

**STATEMENT OF THE ISSUE**

Issue 1: The trial court erroneously failed to provide Mr. Martinez with conflict counsel for trial and to inquire into the nature of the conflict.



## **STANDARD OF REVIEW AND PRESERVATION OF THE ARGUMENT**

Whether a trial court properly refuses to disqualify an attorney is a mixed question of law and fact. *See State v. Balfour*, 2008 UT App 410, ¶ 11, 198 P.3d 471.

Defense counsel did not request new counsel for the defendant, although the defendant raised these issues repeatedly *pro se* to the trial court, both by written and oral motion, which the trial court denied. *See* R. 133-41, 344:5-28, 360.

## **CONSTITUTIONAL OR STATUTORY PROVISIONS**

This appeal is governed by U.S. Const. Amend. V, VI and XIV, Utah Const. Art. I §§ 7, 12.

## **STATEMENT OF THE CASE**

On May 11, 2009, the State charged Martinez with Attempted Criminal Homicide, a First Degree Felony, in violation of Utah Code Ann. § 76-5-201, Robbery, a Second Degree Felony, in violation of Utah Code Ann. § 76-6-301; two counts of Domestic Violence in the Presence of a Child, a Third Degree Felony, in violation of Utah Code Ann. § 76-5-109.1 and Interfering with Lawful Arrest, a Class B Misdemeanor, in violation of Utah Code Ann. § 76-8-305. R. 1-4.

On June 7, 2010, Mr. Martinez moved the court to appoint him new counsel alleging ineffective assistance. R. 133-41. The trial court denied that motion. R. 360:19.

The case was tried to a jury over a three-day period from August 2-4, 2010. R. 343-45. The jury returned a verdict of guilty to the lesser-included offense of aggravated

assault causing serious bodily injury, a second degree felony, and guilty of every other offense on the information. R. 263-64.

On August 18, 2010, following trial, Mr. Martinez's appointed counsel moved to withdraw and to appoint him a conflict attorney. R. 303-04. Conflict counsel filed a motion to recuse the trial judge and to seal the record. R. 314-19. Both motions were denied by the court on September 1, 2010. R. 320-22.

On October 8, 2010, the court sentenced the defendant to 1 to 15 years in the Utah State Prison and a consecutive 1-15 year sentence, which two sentences were to run consecutively to defendant's other prison commitment. R. 335-36. On October 19, 2010, Mr. Martinez filed a motion for new trial. R. 337-41. On November 19, 2010, the defendant withdrew his motion for new trial. R. 363:4.

On December 3, 2010, conflict counsel filed a motion to withdraw and requested conflict appellate counsel. R. 347-48. Additionally, he filed a stipulated motion to extend the time for filing a notice of appeal. R. 349-51. On December 6, 2010, defendant filed a notice of appeal. R. 352. On January 14, 2011, the Salt Lake Legal Defender Association filed a motion for substitution of conflict counsel. R. 356-57.

## **STATEMENT OF THE FACTS**

### **a. The Motion for Ineffective Assistance**

Prior to trial, Mr. Martinez filed a *pro se* motion, alleging ineffective assistance of counsel. R. 133-41. Defense counsel said that Mr. Martinez, "did not like some of the assessments that I gave him and also that Ms. Shreve gave him in regards to the jury

trial.” R. 360:4. Both counsel went to the jail and visited him. R. 360:5. According to defense counsel, “Mr. Martinez in essence indicated that unless we met a list of his demands, so to speak, he was going to send this letter out.” R. 360:5.

Mr. Martinez addressed the court. First, he complained that his attorneys would not file a motion to suppress a statement taken from the defendant’s father in which the defendant allegedly threatened him. R. 360:7-9, 16. Additionally, he alleged that his attorneys had not regularly spoken with him, particularly about a DCFS report. R. 360:9-10, 17-18. His main concerns centered on a lack of communication: “they aren’t telling me what we don’t got and what we do got. And how are we supposed to be ready for trial in August ...[?] That was what my main concern is I felt I wasn't getting their best -- by defending me.” R. 360:19.

Defense counsel contended that they did not have a valid legal basis to file a motion to suppress the father’s statements. R. 360:10-12. Additionally, defense counsel indicated the statement would not be relevant because the state did not plan on introducing it at trial. R. 360:12.

As to the communication issue, defense counsel told the court he visited Mr. Martinez, “more than most” of his clients, approximately three to four times a month. R. 360:13-14. Mr. Martinez acknowledged the visits, but said they only happened when he asked for them. R. 360:15.

The trial court said that he saw “absolutely no basis for replacing counsel in this case.” R. 360:19.

**a. The Motion to Sever.**

Before trial began, defense counsel moved to sever count two, the robbery, from the remaining counts. R. 343:6. The State reasoned that the two should be connected because “one crime precipitates the other ... the attempted homicide precipitates the robbery. The robbery is part of the getaway.” R. 343:6. The State said that count two only involved the getaway and not the retail theft of scissors and cigarettes that occurred prior to the attempted homicide, stating that the State removed that charge from the information. R. 343:7. The State also stated that it would not raise any gang issue in front of the jury. R. 343:7-8.

Defense counsel indicated concern that the State would plan to use the scissor theft as a prior bad act. R. 343:8-9. She also expressed concern that the robbery occurred at a separate location. R. 343:12. The court denied the motion to sever. R. 343:12. But it indicated that the State was not to bring up anything about the theft of the scissors or gang connections. R. 343:13-14.

**c. Motion to Prohibit Officer from Classifying Victim as Delta.**

Prior to trial, defense counsel asked the court to prohibit Officer McPhie from testifying that when he arrived, he classified the victim as in condition delta, or one step short of death. R. 343:18. Defense counsel alleged the officer lacked the qualifications to make that conclusion. *Id.* The court denied that motion. *Id.*

**d. Discussion on Phone Call from Defendant to Victim**

The morning of trial, defense counsel indicated the State told him that they had a recorded phone conversation of the defendant allegedly calling the victim. R. 343:20. Defense counsel had yet to receive the CD. *Id.* One of the prosecutors indicated he hand-delivered the CD to defense counsel's receptionist. *Id.* The State indicated that they were planning on using the CD the next day, and defense counsel asked for an opportunity to review the CD. R. 343:21.

**e. Testimony of Officer McPhie**

David McPhie, a West Valley City police officer, testified that on May 5, 2009, he responded to a call of a stabbing. R. 343:38-39. He arrived at the location at 4:30 am. R. 343:40. He stood close to the door and listened, then knocked. R. 343:41. A child, Gabriel, opened the door and the officer noticed blood on the entryway. R. 343:42, 45. He grabbed the child, whom he described as frozen, and took him outside. R. 343:42-43. The officer then testified, over objection, that Gabriel said, "my dad just killed my mom." R. 343:44.

The officer set the boy down, then proceeded into the home where he observed blood on the living room carpet and items strewn about. R. 343:44-45. As the officer cleared the rooms in the home at gunpoint, he heard a moan and a gurgling sound from behind the front door. R. 343:45-47. As he approached, he saw a woman, covered in blood, lying in the fetal position on the stairs. R. 343:47. The officer noticed open stab wounds on her legs and radioed in a delta assessment, one step short of being deceased.

R. 343:48-49. The officer acknowledged that he had only basic first aid training. R. 343:69. The woman then indicated to the officer that “her ex-husband had stabbed her.” R. 343:49. She also carried on a conversation with the officer and gave him the name and number of her sister. R. 343:76-77. The officer cleared the rest of the home, found another child, Isaiah, upstairs crying, consoled him, and returned downstairs. R. 343:49-52.

The officer located several spots of blood on the window behind the couch, on the blinds, and on the wall. R. 343:60, 63. He also found a pair of scissors on the couch. R. 343:61. The scissors appeared to have blood and hair on them, and the officer opined that these scissors had been used in the assault. R. 343:62. He also found a tequila bottle partially underneath the couch with blood on it. R. 343:64.

#### **f. Testimony of Jose Jimenez**

Jose Jimenez testified that he was working at a 7-Eleven on 3500 South and Redwood Road washing the ground outside when a vehicle pulled up. R. 343:88-90. Jose was a convicted felon who was on probation for possession of a controlled substance with the intent to distribute. R. 343:108. Jose followed the customer, whom he had seen before, into the store and went behind the register. R. 343:90-91. The man appeared to be intoxicated. R. 343:107-08. This was the first time the man had ever talked with Jose. R. 343:107. The man asked him for cigarettes, also picked up some scissors then Jose scanned his items. R. 343:91. The man left the store. R. 343:91.

Some time later, at around 4:25 am, the same customer returned, except this time he appeared upset, lacked a shirt and had blood on his hands. R. 343:93-94, 96. The man asked for gas, and Jose told him he needed to prepay. R. 343:94. The man came back in and asked for gas, but still had not prepaid. R. 343:95. The third time the man came in aggressively, Jose told him the pumps weren't working. R. 343:95-96. The man said to turn on the gas pumps "because he was going to hurt me." R. 343:96. The man then said if the pumps weren't working that "I was going to lose my life." R. 343:97. At no point in the encounter did Jose attempt to call the police, even though a phone was right behind him. R. 343:109-10. At this point, patrol officers arrived. R. 343:97.

**g. The Offer**

After Jose's testimony, Mr. Martinez asked counsel whether the State had made an offer. R. 343:104. The State offered Mr. Martinez a deal where he would plead guilty to Count I as a three to five and to both counts of domestic violence in the presence of a child. R. 343:105. The domestic violence commitments would run consecutively to count one. R. 343:105. Mr. Martinez rejected the offer, and after the court's colloquy, elected to continue with trial. R. 343:106.

**h. Discussion Surrounding Improper Impeachment**

During defendant's cross-examination of Jose Jimenez, counsel attempted to impeach the witness with his testimony in the preliminary hearing, asking whether he testified that he had had dozens of prior conversations with the man. R. 343:112. The prosecutor objected saying that Jose previously indicated simply that he had seen the man

before. R. 343:113. After this exchange, defense counsel ended questioning and the jury left the courtroom. R. 343:114. At this point, the following exchange took place:

THE COURT: You know better than that, Ms. Shreve.

THE DEFENDANT: What is it—I don't understand. What do you mean when she said—

THE COURT: Okay. I wasn't talking to you.

THE DEFENDANT: Yeah, but this is regarding—

THE COURT: I'm sorry. You sit down. I wasn't talking to you.

THE DEFENDANT: I don't understand how—

THE COURT: Ms. Shreve, you know better than that, right?

MS. SHREVE: Right.

THE COURT: [Explains the error in impeachment.]

THE DEFENDANT: It says it right here on the preliminary transcripts.

THE COURT: Really? Want to read it again?

THE DEFENDANT: Yeah. Do you want me to read it to you?

THE COURT: Sure.

THE DEFENDANT: [Reads the preliminary hearing statement.]

THE COURT: Not even close.

THE DEFENDANT: So who is saying that then?

THE COURT: All right. We are done with this conversation. You can talk to your lawyers. That is an improper impeachment.

THE DEFENDANT: Well, I think I'm going to file an ineffective assistance of counsel on me then because you're not representing—you are not representing—you are not going right through the—

THE COURT: Well, you—you know, you file whatever you think is appropriate with me. That's okay. I don't mind that. That is an incorrect impeachment. I've admonished your lawyer as a result of that.

R. 343:114-15.

#### **i. Conflict with Defense Counsel**

The morning of the second day of trial, the Court indicated that at 6 pm the previous evening, both defense counsel engaged in ex-parte communications with presiding Judge Hilder. R. 344:5. Mr. Tan and Ms. Shreve felt “extremely threatened by their client to the point that they are worried about their ability to put on a defense and



feel that they have compromised perhaps by making some bad judgment calls ... because of the perceived intimidation from their client.” R. 344:6. The presiding judge had called Judge Himonas and they tried to telephone conference the prosecution unsuccessfully. R. 344:6. Defense counsel stated that “there’s just something about this particular individual that raises concerns to us.” R. 344:6. He then added, “I think the bigger concern is just our ability to continue to adequately and zealously represent Mr. Martinez in trial.” R. 344:7. The court said, “perhaps his intimidation has led you to do things that would otherwise be against your professional judgment.” R. 344:7. Defense counsel responded, “That’s accurate, your Honor.” R. 344:7.

The court referenced, to defense counsel, the prior night’s improper impeachment, saying that “you’ve got a duty to your client and you’re also an officer of the Court. And at some point you just call, excuse my French, bullshit, and you don’t do things like last night. Right?” R. 344:9. The court then took a recess and allowed the parties to talk. R. 344:11.

After the break, the prosecutor said that defense counsel would represent Mr. Martinez “with the integrity of court officers and do their job like they should.” R. 344:11. She also suggested some safety measures. R. 344:11-12. The court took the parties to chambers where he told them that the record needed to reflect, with the defendant present, that his counsel “felt intimidated by him.” R. 344:13.

Back in court, the trial judge explained to Mr. Martinez that he had again listened to the tape, and was confident that the impeachment was improper. R. 344:15. He

admonished Mr. Martinez, “I don’t believe that your behavior was appropriate. I hope you won’t do that.” R. 344:15. Then the court addressed the conflict: “I’ve been informed by your counsel that they feel intimidated by you, whether rightfully or wrongfully, ... and they have disclosed that intimidation and that has perhaps caused them to do things that they would not otherwise do as officers of the Court. ... We’re going to go forward with this trial. Okay?” R. 344:15-16.

At this point, the court and Mr. Martinez discussed the impeachment, then the defendant stated, “Well, I’m already going to fill out a motion to—file for a new counsel based on integrity of counsel (inaudible).” R. 344:17. The court indicated it had already denied that motion for no basis. R. 344:17. Mr. Martinez responded, “There are issues now today” adding that he thought his counsel would defend the attempted aggravated murder. R. 344:17-18. The court then warned Mr. Martinez about the waiver of privilege and the possibility that he would have to get conflict counsel. R. 344:18-19. The court added that he had already denied the motion for new counsel, “and maybe I’m wrong and will be reversed on that, it won’t be the first time I’m reversed and it won’t be the last time I’m reversed. That’s okay. I just call it like I see it.” R. 344:19. Defense counsel outlined the conflict process and also disputed the allegation that he was not working on the murder charge. R. 344:20-21.

Mr. Martinez responded, “I don’t agree with what you are doing.” R. 344:21. The court acknowledged that he might not agree, but that they were at the point of calling the next witness. R. 344:21. The court asked Mr. Martinez what he wanted, and after

detailing concerns about questioning a juror, he said, “I already asked you I need new counsel, ineffective counsel.” R. 344:22. He added, “I have a right, you know, to a fair trial. And I don’t believe I’m being represented to the fullest like they say—like to be represented.” R. 344:23. The court asked him if he was renewing his prior motion, and Mr. Martinez said yes. R. 344:23. Mr. Martinez stated his basis for the motion:

My lawyers, they feel intimidated by me, so, therefore, we have a conflict of interest. So therefore, they feel they are afraid of me or whatever their complaints would be. So, therefore, there’s a conflict between me and the lawyers. So, therefore, I don’t see how we can, you know, communicate without me feeling that there’s a fear between me and them. R. 344:23.

Both defense counsel indicated that they could vigorously represent Mr. Martinez. R. 344:23-24. The court told defendant, “I don’t think that you get to recreate the situation in which you get new counsel by doing that.” R. 344:24. Defendant mentioned his specific concerns: he wanted counsel to file a motion to suppress, he also claimed he was told that they would be fighting one case at a time (the attempted aggravated murder, then the robbery) and then suddenly at trial, both cases are being tried together. R. 344:25. The court reminded Mr. Martinez that counsel had moved to sever and that he denied it. R. 344:25-26. Defendant wondered why he was not at court to hear the argument. R. 344:26. Both defense counsel indicated that defendant was present and the court said, “Stop pulling my leg then Mr. [Martinez], you were here.” R. 344:26.

The court then asked to move forward and the following interchange took place:

THE DEFENDANT: I’ll agree to go forward with this counsel.

THE COURT: I’m not giving you a choice. Your motion is denied. You have the right at the end—

THE DEFENDANT: So you are violating my constitutional rights—

THE COURT: I don't, I don't believe—

THE DEFENDANT: --to a fair trial.

THE COURT: I don't believe that I am. [The court explains the right to appeal or for a new trial.] You are being very difficult, Mr. Martinez.

THE DEFENDANT: It's my life that's on the line.

THE COURT: I'm not telling you that it's not. I'm telling you that I've tried—you know, there are a couple of hundred jury cases, and I'm telling you that you are being as difficult a defendant as any I have encountered in the couple of hundred jury cases that I have dealt with.

Are you trying to stare me down, Mr. Martinez? For the record, are you trying to stare me down?

THE DEFENDANT: I was looking at you while you are talking.

THE COURT: Are you trying to stare me down, Mr. Martinez?

THE DEFENDANT: I'm just looking at you while you are talking. That's all.  
(Inaudible.)

THE COURT: How about in the back? Is that what's going on? Sir?

UNKNOWN SPEAKER: Grinning.

THE COURT: Yes.

UNKNOWN SPEAKER: I'm not.

THE COURT: All right. Are we ready to go forward?

R. 344:27-28. After this exchange, the state called its next witness. R. 344:30.

#### **j. Testimony of Owen Duffy, M.D.**

Owen Duffy, an emergency room physician, testified that he did not recall specifically the events in question and had to testify largely from his report alone. R. 344:31-37. However, in reviewing his report, he testified that Teresa Martinez arrived in tears, awake, alert and oriented. R. 344:38. She had a small laceration on her head as well as lacerations on her left arm and left leg. R. 344:38-39, 41. He concluded that "her vital signs were stable. And it did not appear that at least on the primary survey that she had anything life threatening." R. 344:43. He testified that Teresa's wounds were not life

threatening. R. 344:44. The doctor opined that someone would have to strike the major arteries, which did not happen in this case, for the wounds to be serious. R. 344:50.

**k. Testimony of Robert Cowan**

Robert Cowan, West Valley City police officer, testified that he heard a call over the radio that a short Hispanic male stabbing suspect had fled in a red Chevy Blazer. R. 344:55, 63. He noticed a red Blazer parked in a 7-Eleven. R. 344:59. He pulled behind the vehicle and saw Mr. Martinez exiting the store without his shirt. R. 344:60-61. The officer ordered him to stop because he believed him to be the suspect. R. 344:62. As Mr. Martinez approached the officer, he was pointing to his head or neck area and yelling, though the officer did not hear what he was saying. R. 344:76-77. Mr. Martinez did not stop after being ordered to “multiple times.” R. 344:63. Mr. Martinez headed toward the officer “clenching his fist, pumping his muscles, bouncing, like he was agitated.” R. 344:64. The officer saw blood on Mr. Martinez’s hands. R. 344:65. As Mr. Martinez approached the officers, Officer Johnson yelled “taser, taser, taser” then tazed Mr. Martinez in the back. R. 344:68. Officer Johnson did not say anything to Mr. Martinez prior to tazing him. R. 344:69. Mr. Martinez fell to the concrete, hitting his head on the ground, and it started to bleed. R. 344:69.

The officer testified that the blood from his head did not appear to have spread to Mr. Martinez’s hands. R. 344:70. The officer noticed a puncture wound on Mr. Martinez’s arm, which he opined did not come from the tazing fall, and that it seemed

more consistent with a stab wound. R. 344:72, 80. Though the officer acknowledged that he did not know whether defendant's injuries came before the fall or after. R. 344:79.

### **l. Testimony of Lucas Johnson**

Officer Lucas Johnson of the West Valley City police department responded to the gas station as well. R. 344:82-84. He observed a heavier set Hispanic male walking toward Officer Cowan. R. 344:84. The man had blood on his hands and was not complying with Officer Cowan's orders. R. 344:88-89. He did not see blood anywhere on his body except on both arms from his mid arm down to his fingers. R. 344:89-90. The person appeared agitated with his hands clenched. R. 344:90. Officer Johnson pulled out his taser, looked to Officer Cowan, who nodded, then he fired the taser. R. 344:91. Mr. Martinez fell over and "quite loudly hit his head." R. 344:92. As the officer rolled him over, he noticed a 4-inch gash on the back of his head, bleeding extensively. R. 344:93.

### **m. Testimony of Franco Libertine**

Franco Libertine, a West Valley City patrol officer, testified that he went to the crime scene and spoke with Gabriel Martinez. R. 344:103. Defense counsel objected to the hearsay statements, but the court overruled the objection. R. 344:104. The officer said Gabriel told him that he heard his father, Julio, tell his mother, Teresa, "I will kill you. This is what happened to you for fucking my brother." R. 344:105. The officer also went to the hospital to speak with Teresa Martinez. R. 344:105-06. As he approached her room, he heard Teresa screaming in pain, though he was able to hold a conversation with

her. R. 344:107, 119. She told him the name of her sister-in-law, whom she wanted to take the kids. R. 344:124-25. The officer photographed Teresa's injuries. R. 344:108-09.

#### **n. The Motion to Recuse**

After Mr. Libertine's testimony, defense counsel, in chambers made a motion to recuse the trial judge because of information he may have heard from presiding Judge Hilder pertaining to confidential client communications. R. 344:132-34. Judge Hilder got on the phone, and summarized that Mr. Tan and Ms. Shreve approached him expressing concern and challenges with their client. R. 344:135. "Mr. Tan indicated that there was a sense of intimidation and staring down episode and we did not discuss what was behind that ..." R. 344:135. Additionally, Ms. Shreve told Judge Hilder that she was intimidated and "that there was a sense of being compromised in the ability to exercise a judgment they normally exercise or to make a decision they would normally make." R. 344:136. Judge Hilder told Judge Himonas that some defendants have gender issues that "would, in fact, be better served by a different counsel appointment. That that was one factor that might have been worked here." R. 344:136.

Ms. Shreve indicated that "after sleeping on it, waking up this morning with some additional security that I felt like I am comfortable to go forward and advocate for my client and not allow this [to] affect my ability to represent him." R. 344:137. The trial court gave counsel the opportunity to talk with Judge Hilder privately about what issues she communicated to him. Judge Hilder said that counsel "did tell me things that would have been a concern" and "that the concern might be an effective strategy ..." R.

344:137. Ms. Shreve then indicated that “I don’t think we have a good basis for a motion to recuse.” R. 344:138.

**o. Testimony of Gabriel Martinez**

Gabriel, age 11 at the time of trial, testified that he went to bed that evening in his mother’s room. R. 344:141, 145. In bed, he heard his mother talking and his father saying that “he was going to go for the people who killed his brother.” R. 344:145. Gabe’s father and mother went downstairs and he heard his father say, “do you want to see how tough I am?” R. 344:146. Gabe said his father then did something to his arm and he heard his mother say, “Stop, that’s—stop that’s not ...” R. 344:146. Gabe said he climbed out of bed and while peeking downstairs, “I saw him stabbing my mom.” R. 344:149. His father left again, came back in, stared at his mom, then got in his truck and left. R. 344:146. Gabe added that he looked out the window and saw his dad drive to the 7-Eleven and go inside. R. 344:146, 151. Gabe talked with police on the phone while his mom was on the stairs. R. 344:146-47. Gabe testified that he only saw blood on the first level of the house. R. 344:234.

**p. The Motion for Mistrial**

After lunch, the bailiff was asked by jurors why there were two bailiffs in the courtroom. R. 344:164. One of the jurors responded, “It’s so the Defendant can be detained.” R. 344:164. The bailiff responded that it was for training purposes. R. 344:164. The court said it was inclined to instruct the jury and the state had no objection, other than it noted that it might be better to remain silent. R. 344:164-65. Ms. Shreve then



made a motion for mistrial, which the court denied. R. 344:165. Ms. Shreve indicated that the jury's comment made it "clear [that] they think that the client is being detained and in custody. And I think that is so prejudicial." R. 344:165. Defense counsel also objected to the fact that there were two plainclothes officers who mingled with Mr. Martinez and drew attention to his status. R. 344:169.

The court offered to give a jury instruction or to question individual jurors. R. 344:166. Defense counsel waived these methods, reasoning they would only call attention to Mr. Martinez's custody status. R. 344:166-167. The prosecutor noted that the prejudice lies in seeing the defendant in handcuffs, not knowing his custody status. R. 344:168. The court denied a renewed motion for mistrial. R. 344:168.

#### **q. Testimony of Teresa Martinez**

Teresa Martinez testified that she was living alone with her two boys on May 5<sup>th</sup>. R. 344:172-74. Julio came over to the house, she said, and asked if he could sleep on the couch, since he had been drinking. R. 344:175. She invited him in because she did not want him to drive. R. 344:175, 210. Even though they were separated, they also were still friends and spoke with each other. R. 344:210. She went to bed, but about fifteen to twenty minutes later, Julio asked if he could sleep on the bed, and Teresa agreed, stating she felt comfortable with him on the bed. R. 344:175-76, 212. In bed, Julio talked about his brother, saying he wanted to find out who killed him. R. 344:176. He became more agitated, and Teresa, not wanting to wake up the children, asked him to come downstairs. R. 344:176.

Once downstairs, Julio kept talking about his brother. He said, “Do you want to see how I am? Do you want to see how down I am?”—then he walked into the kitchen, grabbed a knife and stabbed himself in the arm. R. 344:177. Teresa grabbed a towel and put it on his arm to apply pressure and asked him what he was trying to prove. R. 344:178. Julio then went upstairs to talk with the kids and tell them how much he loved them. R. 344:178. He told the kids that he loved them, then Teresa asked him to go outside. R. 344:176, 179. Once outside, Julio got on the phone, then left to buy more cigarettes. R. 344:176-77, 179. Teresa called Julio’s sister Veronica and warned her about her brother, then went to bed. R. 344:179-80.

About two hours later, around 2 am, Julio returned, though Teresa acknowledged not looking at the clock. R. 344:180-81. She opened the door and Julio came into the house. R. 344:182. He asked her to have sex with him and told her that she would pay for sleeping with his brother. R. 344:184. Julio pulled a pair of scissors out of his pocket and went and turned off the lights. R. 344:185. He then stabbed Teresa repeatedly, saying, “This is what you get. This is what you get.” R. 344:186. Teresa got into a fetal position to protect herself. R. 344:186. She estimated she was stabbed about fifteen times. R. 344:188. She played dead, the stabbing stopped and Julio left driving a Chevy Blazer. R. 344:188-89, 207. Teresa ran to the door, locked it, then hopped to the telephone and dialed 911. R. 344:189-90. She felt light headed and asked her son Gabriel to talk with the operator. R. 344:191. Soon paramedics arrived and treated Teresa. R. 344:192.

Teresa testified that all the injuries came from Julio. R. 344:195-98. She had surgery on her knee and lower left arm, testifying that they caused her a lot of pain for several months. R. 344:198. She lost full function of her hands. R. 344:199. She described needing stitches in multiple locations. R. 344:199-202.

Teresa also admitted to lying to the police in another incident. R. 344:219-20. She also acknowledged that her children stayed with other family members for approximately six months after the incident. R. 344:220-21.

#### **r. The Motion for Directed Verdict**

Mr. Martinez moved for directed verdict after the State's case, alleging insufficient evidence to convict him on the intentionally or knowing element of the statute, given his intoxication. R. 344:226. Additionally, Mr. Martinez claimed that the evidence was insufficient to show that the injuries were actually life threatening. R. 344:226. The court denied the motion. R. 344:226. Defendant also renewed the motion for mistrial, which the court said was waived. R. 344:227-28.

Defendant also elected not to testify and confirmed that decision with the court, noting that no one forced him to make that decision. R. 344:228-30, 235-36.

#### **s. The Motion to Strike the Juror**

On the third day of trial, Mr. Martinez indicated to the bailiff that he recognized the juror who stated the defendant was detained. R. 345:4. Mr. Martinez moved to strike the juror, the state assented, and the court removed the juror from the panel, replacing him with an alternate. R. 345:13.

#### **t. Defendant's Closing Statement**

In defense counsel's closing argument, he asked the jury to find Mr. Martinez guilty. R. 345:24-25. He said, "Julio Martinez made some bad decisions." R. 345:24. "[I]nterference with an arresting officer. I want to save all of us some time. I would save [the prosecutor] some time. ... He's guilty. You can check that off." R. 345:25. On the domestic violence in the presence of a child felonies, counsel said, "Julio Martinez is guilty of that as well. Just save sometime [sic]." R. 345:25. Then counsel said, "I'm going to submit to you on guilty three and four based on intentionally causing serious bodily injury, bodily injury or use a dangerous weapon against a cohabitant." R. 345:26. "There's no dispute in regard to what happened. Julio stabbed Teresa multiple times." R. 345:27. Counsel then told the jury they had only one choice: to find Julio guilty of either attempted criminal homicide or guilty of domestic violence and aggravated assault. R. 345:27. As to whether the jury could find Mr. Martinez not guilty of all offenses, counsel said, "It's not going to happen." R. 345:27.

To conclude, defense counsel said, "[F]rankly, Julio did not follow the law. I would ask that after deliberating you find Julio Martinez guilty on Count I, as domestic violence, aggravated assault using unlawful force or dangerous weapon ..." R. 345:40.

#### **u. Telephone Conference Post-Trial**

The day after the trial, the court called both counsel and held a telephone conference. R. 360. According to the trial judge, he was playing racquetball with his clerk, who also happened to be a clerk at defense counsel's office, when his clerk

mentioned that “Ms. Shreve was, not last night but the night before, followed home and had to alert the authorities.” R. 360:3, 4. Defense counsel mentioned that Ms. Shreve called the Kaysville police. R. 360:3. The court felt it had the obligation to disclose the statement. R. 360:4.

#### **v. Sentencing and the Motion for New Trial**

At sentencing, newly appointed conflict counsel indicated that defendant had asked him to file a motion for new trial. R. 362:5. The court and the prosecution agreed to allow Mr. Martinez to file a bare bones motion and memo within the 10-day period after sentencing, with leave to file a substantive memo later. R. 362:6-7.

Additionally, at sentencing, the prosecution recommended a consecutive prison sentence, based in part on “Defendant's behavior during trial, him causing the defense counsel to have concerns for their own safety ....” R. 362:9.

Conflict counsel filed a motion for new trial, in which he alleged that “Mr. Martinez’s trial attorneys did not fully explain discovery to him, did not adequately consult with Mr. Martinez prior to or during the trial. Mr. Martinez was also affirmatively prevented by his trial attorneys from raising various arguments and from presenting evidence at trial. ... The performance of Mr. Martinez’s trial attorneys amounted to ineffective assistance ...” R. 338. Additionally, counsel asserted that because Mr. Martinez did not understand the discovery, his “understanding of some of the evidence presented by the State came at trial when Mr. Martinez was unable to adequately prepare and participate in his own defense. Mr. Martinez also asserts that trial counsel did not

consult with him or advise him regarding trial strategy and simply made numerous, important decisions about the litigation of his case without adequately discussing it with him or even informing him at all.” R. 339. Counsel also claimed that Mr. Martinez’s attorneys failed to “follow obvious investigative leads to support Mr. Martinez’s claims of prior violence and manipulative behavior by the state’s complaining witness.” R. 339. Finally, the motion claimed that “Mr. Martinez repeatedly asked his attorneys to ask specific questions designed to elicit statements supporting a claim of self-defense.” R. 340.

**w. Withdrawal of the Motion for New Trial**

On November 19, 2010, defendant indicated that he wanted to withdraw his motion for new trial. R. 363:4. The court then advised Mr. Martinez that he had thirty days from that date in which to file a notice of appeal. R. 363:5.

**SUMMARY OF THE ARGUMENT**

Defendant’s counsel manifested grave concerns about their ability to represent Mr. Martinez. They claimed that he had stared them down, and as a result, they felt compromised in their ability to zealously represent Mr. Martinez. They brought their concerns up to the presiding district court judge, who made them aware to the trial court. The court discussed the matters with the parties, who after a brief recess, stated that they felt they could continue to represent Mr. Martinez. Mr. Martinez objected and asked the court to appoint him new counsel. Particularly concerning to Mr. Martinez was his

attorneys' unwillingness to communicate with him. He asserted that he would not be able to have a fair trial without adequate communication with his counsel. The court, in a perfunctory manner, failed to adequately assess the depth of the conflict or to assure that counsel and Mr. Martinez were able to communicate.

Additionally, the record reflects that counsel became more interested in the jury convicting Mr. Martinez of an offense, rather than holding the state to its burden. He never told the jury that it could hold the state to its burden and find Mr. Martinez not guilty of any or of all of the offenses. In fact, defense counsel asked the jury to find Mr. Martinez guilty of all but one offense, and proffered that they should find him guilty of a lesser-included offense.

Mr. Martinez asked the court, at least three times, to provide him with counsel who would communicate with him and who were not afraid of him. The court failed to adequately assess the situation and failed to provide Mr. Martinez with counsel who were free from conflicts of interest.

## **ARGUMENT**

### **I. THE TRIAL COURT ERRONEOUSLY FAILED TO PROVIDE MR. MARTINEZ WITH CONFLICT COUNSEL AND TO INQUIRE INTO THE NATURE OF THE CONFLICT**

The Sixth Amendment of the United States Constitution guarantees each criminal defendant the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); *United States v. Cronin*, 466 U.S.

648, 80 L. Ed. 2d 657, 104 S. Ct. 2039 (1984). See *State v. Frampton*, 737 P.2d 183, 187 (Utah 1987).

The United States Supreme Court listed several “basic duties” of defense counsel, which if not followed, may result in a finding of ineffective assistance. *Strickland*, 466 U.S. at 688. According to the Court, because the attorney owes his client a duty of loyalty, an attorney must “assist the defendant,” “advocate the defendant’s cause,” “avoid conflicts of interest,” “consult with the defendant on important decisions,” and “keep the defendant informed of important developments in the course of the prosecution.” *Id.* These standards do not form an exhaustive checklist of defense counsel’s duties, rather, defense counsel must reasonably assist the defendant in receiving a fair trial. *Id.* at 688-89. “Moreover, some conduct, such as various kinds of state interference with counsel’s assistance and active representation of conflicting interests, is so egregious that it is presumed to result in prejudice to defendant’s defense.” *State v. Classon*, 935 P.2d 524, 533 (Utah Ct. App. 1997) (citing *Strickland*, 466 U.S. at 692).

As the Court in *Strickland* noted:

That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel’s playing a role that is critical to the ability of the adversarial system to produce just results.

*Strickland*, 466 U.S. at 685.

“An accused is entitled to be assisted by an attorney ... who plays the role necessary to ensure that the trial is fair.” *Id.* See also *Kryger v. Turner*, 479 P.2d 477, 480



(Utah 1971) (“The right of an accused to have counsel is not satisfied by a sham or pretense of an appearance in the record by an attorney who manifests no real concern about the interests of the accused.”); *see also Alires v. Turner*, 449 P.2d 241, 243 (Utah 1969). “The accused is entitled to the assistance of a competent member of the Bar, who demonstrates a willingness to identify himself with the interests of the defendant and who will assert such defenses as are available to him under the law and consistent with the ethics of the profession. *Kryger*, 479 P.2d at 480. “The failure of such representation constitutes a departure from due process of law.” *Id.*

Because a violation of the right to counsel is so entwined with the right to a fair trial, it cannot be harmless error. *Chapman v. California*, 386 U.S. 18, 23 n.8, 17 L. Ed. 2d 705, 87 S. Ct. 824 (1967) (citing *Gideon v. Wainwright*, 372 U.S. 335, 9 L. Ed. 2d 799, 83 S. Ct. 792 (1963)).

An attorney has a duty of loyalty to his client. This “duty of loyalty” has been described as “perhaps the most basic of counsel's duties.” *Strickland*, 466 U.S. at 692. The “faithful discharge” of the duty of loyalty is a “vital factor” mandated by the Rules of Professional Conduct and by the Sixth Amendment. *State v. Holland*, 876 P.2d 357, 359 (Utah 1994) (citing *United States v. Cronin*, 466 U.S. 648, 656-57, 80 L. Ed. 2d 657, 104 S. Ct. 2039 (1984); *Von Moltke v. Gillies*, 332 U.S. 708, 725-26, 92 L. Ed. 309, 68 S. Ct. 316 (1948) (plurality opinion)). “[D]efendants are wholly dependent on the dedication of their attorneys to protect their interests and to ensure their fair treatment under the law.” *Id.* An attorney should be “devoted solely to the interests of his client [with] [u]ndivided

allegiance and faithful, devoted service.” *Id.* (citing *Von Moltke v. Gillies*, 332 U.S. 708, 725-26, 92 L. Ed. 309, 68 S. Ct. 316 (1948) (Black, plurality opinion). A defense attorney should force the prosecutor’s case to “survive the crucible of meaningful adversarial testing.” *Id.* at 361 (citing *United States v. Cronin*, 466 U.S. 648, 656, 80 L. Ed. 2d 657, 104 S. Ct. 2039 (1984)). A violation of the duty of loyalty forces the process to lose “its character as a confrontation between adversaries, [and] the constitutional guarantee is violated.” *United States v. Cronin*, 466 U.S. at 656-57.

Attorneys must be “active advocate[s]” and not “friend[s] of the court.” *Evitts v. Lucey*, 469 U.S. 387, 394, 83 L. Ed. 2d 821, 105 S. Ct. 830 (1985). “Unless an attorney represents the interests of a client with zeal and loyalty, the adversarial system of justice cannot operate.” *State v. Holland*, 876 P.2d at 362.

“[E]ven when no theory of defense is available, if the decision to stand trial has been made, counsel must hold the prosecution to its heavy burden of proof beyond reasonable doubt.” *Cronin*, 466 U.S. at 667 n. 19. The duty of loyalty prohibits a defense attorney from telling the jury that the state has met its burden of proof. *United States v. Swanson*, 943 F.2d 1070, 1074 (9th Cir. 1991).

[T]he very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free. In a criminal trial, which is in the end basically a factfinding process, no aspect of such advocacy could be more important than the opportunity finally to marshal the evidence for each side before submission of the case to judgment.

*Id.* at 1074 (quoting *Herring v. New York*, 422 U.S. 853, 862 (1975)).

Several courts have presumed prejudice when counsel have failed to zealously represent their clients. *Javor v. United States*, 724 F.2d 831 (9th Cir. 1984) (attorney slept through trial); *Green v. Arn*, 809 F.2d 1257 (6th Cir.), vacated on other grounds, 484 U.S. 806, 108 S. Ct. 52, 98 L. Ed. 2d 17 (1987), reinstated, 839 F.2d 300 (1988), cert. denied, 488 U.S. 1034, 102 L. Ed. 2d 979, 109 S. Ct. 847 (1989) (counsel's absence during cross-examination); *Siverson v. O'Leary*, 764 F.2d 1208, 1217 (7th Cir. 1985) (attorney absent during verdict); *Harding v. Davis*, 878 F.2d 1341 (11th Cir. 1989) (attorney silent when court directed verdict against defendant). "[A]n attorney who adopts and acts upon a belief that his client should be convicted fail[s] to function in any meaningful sense as the Government's adversary." *Osborn v. Shillinger*, 861 F.2d 612, 625 (10th Cir. 1988) (quoting in part *Cronic*, 466 U.S. at 666)). An "attorney who is burdened by a conflict between his client's interests and his own sympathies to the prosecution's position is considerably worse than an attorney with loyalty to other defendants, because the interests of the state and the defendant are necessarily in opposition." *Osborn*, 861 F.2d at 629.

Under established law, an indigent defendant does not have a right under either the United States or the Utah Constitution to reject court-appointed counsel in order to force the court to appoint new counsel unless the defendant shows "good cause." See *Wulffenstein*, 733 P.2d at 121. To successfully show "good cause" for rejecting court-appointed counsel, a defendant must meet a heavy burden. A defendant must do more than show that he or she does not have a "meaningful relationship" with his or her attorney. See *id.* Moreover, "the fact that a defendant does not get along with his [or her] attorney does not, standing alone, establish a denial of the effective assistance of counsel." *Gardner v. Holden*, 888 P.2d 608, 622 (Utah 1994) (plurality opinion), cert. denied, 516 U.S. 828, 133 L. Ed. 2d 52, 116 S. Ct. 97 (1995). Instead, to establish "good cause" for rejecting a court-appointed attorney, a defendant "must also establish that the animosity [between the

defendant and his or her attorney] resulted in such a deterioration of the attorney-client relationship that the right to the effective assistance of counsel was imperiled." *Id.*; see also *Pursifell*, 746 P.2d at 274 ("Substitution of counsel is mandatory when the defendant has demonstrated good cause, such as a conflict of interest, a complete breakdown of communication, or an irreconcilable conflict with his or her attorney.").

*State v. Scales*, 946 P.2d 377, 382 (Utah Ct. App. 1997).

"The defendant may meet this burden by showing that the counsel offered him was incompetent or otherwise inadequate to the task of representing him. After all, [a] defendant cannot be forced to proceed with incompetent counsel . . . '[a] choice between proceeding with incompetent counsel or no counsel is in essence no choice at all.'" *State v. Arguelles*, 2003 UT 1, ¶ 74, 63 P.3d 731 (quoting *State v. Bakalov*, 1999 UT 45, ¶ 20, 979 P.2d 799) (quoting *Wilks v. Israel*, 627 F.2d 32, 36 (7th Cir. 1980)).

**a. The Animosity Between Defendant and Counsel Resulted in the Deterioration of the Attorney-Client Relationship to the Point that it Affected Defendant's Right to Effective Assistance of Counsel**

In this case, the following deteriorations happened between counsel and defendant.

- Defendant asserted that his attorneys were not keeping him informed of the progress on the case. Defense counsel disputed this. R. 133-41; 360:4-19.
- Defense counsel approached the presiding judge, mid-trial, to indicate that their client had intimidated them to the point that it affected "our ability to continue to adequately and zealously represent Mr. Martinez in trial." R. 344:7. Defendant expressed his concern to the court of defense counsel's fears, focusing on their ability to adequately communicate:

- “My lawyers, they feel intimidated by me, so, therefore, we have a conflict of interest. So therefore, they feel they are afraid of me or whatever their complaints would be. So, therefore, there’s a conflict between me and the lawyers. So, therefore, I don’t see how we can, you know, communicate without me feeling that there’s a fear between me and them.” R. 344:23.
- Defense counsel represented that Mr. Martinez’s intimidation caused them to make poor strategic decisions. R. 344:6, 7, 136.
- Defendant complained his counsel was ineffective for improperly impeaching a state witness. R. 343:114-15.
- Defense counsel also apparently called the police after she had been followed home after the first day of trial. R. 360:3-4.

Defense counsels’ ability to zealously represent Mr. Martinez was clearly compromised, per counsels’ own admissions on the record. Mr. Martinez allegedly stared them down and intimidated them to the point that counsel approached the presiding and the trial judge to express their concerns. R. 344:5-7. Counsel said these episodes affected their ability to make rational, strategic decisions in the case. R. 344:7. However, after the prosecution assured counsel that they would be protected, counsel felt more comfortable proceeding. R. 344:11-12. See also, R. 344:137 (defense counsel says that she can now represent Mr. Martinez “after sleeping on it, waking up this morning with some additional security that I felt like I am comfortable to go forward ...”). Such a

compromise clearly would affect not only a defendant's ability to communicate with his counsel, but would also affect counsel's willingness and desire to act with the duty of loyalty. *See State v. Holland*, 876 P.2d at 362 ("Unless an attorney represents the interests of a client with zeal and loyalty, the adversarial system of justice cannot operate."). Counsel openly indicated that this experience affected his ability to "adequately and zealously" represent Mr. Martinez. R. 344:7. This would be the classic type of irreconcilable conflict. *See Pursifell*, 746 P.2d at 274 ("Substitution of counsel is mandatory when the defendant has demonstrated ... a conflict of interest, a complete breakdown of communication, or an irreconcilable conflict with his or her attorney.").

Arguably, the defendant created these conflicts, however, the most serious violation appears to have been a "stare-down" as counsel alleged. Mr. Martinez did not threaten violence or extreme measures. Clearly, he had difficulty working with his appointed counsel, but he chose to raise these concerns with the court and to seek the appointment of an attorney who would, in his words, not deprive him of a fair trial and who would "represent[ him] to the fullest ..." R. 344:23.

Courts have frequently allowed defendants to obtain new counsel when a conflict exists, even if created by the defendant in much more severe situations than the one at hand. *People v. Parker*, 2002 Cal. App. Unpub. LEXIS 4159 (noting that a mistrial was declared after defendant threatened his attorney); *State v. Toste*, 504 A.2d 1036, 1046 (Conn. 1986) (defendant was appointed two separate attorneys after threatening his attorney and refusing to cooperate); *People v. Manuel*, 9 A.D.3d 1185; 834 N.Y.S.2d 790

(N.Y. Sup. 2007) (noting defendant's delays were caused by seven attorney changes after defendant threatened his attorney); *State v. Brillon*, 955 A.2d 1108, 1120 (Vt. 2008) (noting trial court was "compelled" to allow counsel to withdraw after defendant threatened him).

The clearest indication of the breakdown in the attorney-client relationship was counsel's closing argument, in which he told the jury that they did not have the option of finding the defendant not guilty—that they needed to find him guilty of either the attempted criminal homicide or of aggravated assault. R. 345:24-27. While counsel clearly hoped the jury would convict of the lesser-included offense, which they did, he did not give the jury the option of a not-guilty verdict if the jury believed the state had failed to meet its burden of proof. This is the type of advocacy the Supreme Court has expressly prohibited. *See Cronin*, 466 U.S. at 667 n. 19 (“[E]ven when no theory of defense is available, if the decision to stand trial has been made, counsel *must hold the prosecution to its heavy burden of proof* beyond reasonable doubt.”) (emphasis added). In fact, as to the aggravated assault and to the domestic violence offenses, defense counsel conceded that the state had met its burden for those offenses. R. 345:25-27. As the Tenth Circuit Court of Appeals stated, “an attorney who adopts and acts upon a belief that his client should be convicted fail[s] to function in any meaningful sense as the Government's adversary.” *Osborn v. Shillinger*, 861 F.2d 612, 625 (10th Cir. 1988) (quoting in part *Cronin*, 466 U.S. at 666)).

While both counsel indicated they would continue to zealously represent Mr. Martinez, this promise seems merely illusory. Both counsel spoke with the presiding judge about how the defendant's intimidation caused them to be fearful and to not represent Mr. Martinez fully. Without anything changing in the situation, other than the state's promise of additional security, and then in front of the defendant, counsel said they could continue to represent him. Mr. Martinez continued, despite counsel's statements, to argue that the attorney client relationship had been destroyed, particularly as it related to the ability to communicate in confidence. Perhaps counsel could continue to represent Mr. Martinez at trial, however their communications with the defendant would have been drastically undermined. *See* Rule 1.4, Rules of Professional Conduct (a lawyer shall keep the client informed).

Additionally, counsels' disclosure to the court of the threats against them arguably violated the Rules of Professional Conduct as to confidentiality and conflict of interest. *See* Rule 1.6, Rules of Professional Conduct; *see also* Rule 1.7(b) ("A lawyer shall not represent a client if the representation of that client may be materially limited ... by the lawyer's own interest."). An attorney may only disclose information relating to the representation of the client with the client's consent, if the matter involves future crimes or fraud, or to establish a lawyer's defense in a controversy with the client. Rule 1.6(a) and (b). *See e.g., Spratley v. State Farm*, 2003 UT 39, ¶¶ 14-22, 78 P.3d 603 (while in-house counsel could disclose matters of representation to insurers, under Rule 1.6, "it remains the attorney's duty to minimize disclosures" and "any disclosures made by the



attorney that are not reasonably necessary to [a] claim may still subject that attorney to professional discipline or litigation sanctions”); Utah Ethics Advisory Op. No. 05-02 (Utah St. Bar) (“Where an attorney serving as defense counsel in a criminal case is expressly requested by the court at a sentencing hearing for information obtained from or about the defendant regarding the defendant's prior convictions, the attorney may only answer with the client's informed consent; otherwise, the attorney must respectfully decline to answer the court's request in a manner that will not be misleading to the court.”).

However, defense counsels’ disclosures would probably have been appropriate to make the court aware of the seriousness of the conflict so that the court could appoint competent, non-conflicted counsel to represent the defendant, an action the trial court should have taken in this case. *See e.g., State v. Holland*, 876 P.2d 357, 359 (Utah 1994) (defense counsel should have been disqualified because of an actual conflict of interest).

Perhaps most significantly, Mr. Martinez’s attorneys withdrew as his appointed counsel after trial and had a conflict attorney appointed. R. 303-04. That attorney alleged that both trial attorneys were ineffective. R. 337-41. If defense counsel felt they could continue to confidently and zealously represent Mr. Martinez, then they would not have withdrawn as his attorneys. The fact that they withdrew and asked for a conflict attorney to represent Mr. Martinez for sentencing and future proceedings indicates the severity of the conflict and that an actual conflict existed from the moment of disclosure until well

after the trial. If counsel were unable to represent Mr. Martinez at sentencing, they clearly would have the same conflicts at trial.

Additionally, the trial court failed to conduct an adequate colloquy to determine the extent of the breakdown of the attorney-client relationship. When the court informed defendant of his counsel's disclosures, Mr. Martinez immediately made a motion for new counsel. R. 344:17, 23. The court simply asked defense counsel if they could continue to represent Mr. Martinez. They said that they could and the court denied the motion. R. 344:23-24, 27-28. Additionally, the trial judge accused Mr. Martinez of staring him down as he was denying the motion and seemed disinclined to consider Mr. Martinez's perspective. R. 344:27-28. At no point did the court discuss details with counsel; nor did the court ask them whether they would continue to have difficulty communicating with Mr. Martinez. It simply denied the motion without making inquiries into counsels' basis for fear or intimidation.

In *United States v. Walker*, 915 F.2d 480 (9<sup>th</sup> Cir. 1990), the defendant filed a motion requesting new counsel, alleging his attorney was not fully representing him, finding witnesses or helping on his case. *Id.* at 481-82. The defendant alleged a communication breakdown, then the court summarily denied the motion. *Id.* at 483, 484. The appellate court was troubled that "the district court made virtually no attempt to discover the causes underlying Walker's dissatisfaction with his attorney." *Id.* Walker and his counsel were not speaking because of the conflict, the court discovered. *Id.* 483-84. As a result of the court's denial, the defendant "was forced into a trial with the assistance

of a particular lawyer with whom he was dissatisfied, with whom he would not cooperate, and with whom he would not . . . communicate. Thus, the attorney was understandably deprived of the power to present any adequate defense in [Walker's] behalf.” *Id.* (quoting *Brown v. Craven*, 424 F.2d 1166, 1169 (9th Cir. 1970)). The 9<sup>th</sup> Circuit did not attribute these faults to counsel, noting that it would be difficult to represent someone who will not speak with you. *Id.* at 484. But the court held that the failure to appoint substitute counsel deprived Walker of his right to effective assistance of counsel. *Id.*

In *United States v. Moore*, 159 F.3d 1154 (9<sup>th</sup> Cir. 1998), the defendant made four separate motions in which he asked the court to appoint him substitute counsel due to a lack of communication. *Id.* at 1156. The court found that counsel and defendant frequently argued, defendant was not satisfied, he would not communicate with his attorney, and that the relationship was filled with threats and counter-threats. *Id.* at 1159-60. Counsel also indicated in chambers that he feared his client would sue him and that affected their ability to communicate. *Id.* at 1160. The court, however, “made no inquiries to help it understand the extent of the breakdown.” *Id.* In fact, the court felt it needed to move the trial along and didn’t want to speculate as to the extent of the conflict. “The court was wrong, these facts are highly relevant to the existence and extent of conflict between Cozens and Moore, and the court had a duty to make further inquiries. The court seemed above all to be determined not to disturb its trial schedule . . .” *Id.* Given these facts, the court found an irreconcilable conflict and remanded the case for a new trial. *Id.* at 1161.

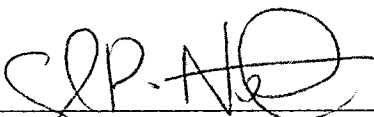
Similarly, in this case, the trial judge heard of the potential conflict and made no efforts to assess the extent of the breakdown. Frequently, when this issue was raised, the court would summarily deny the motion without making further inquiry and assert that the state should call its next witness or that the matter should move forward. R. 344:15-16, 21, 27, 28, 29. The court erroneously failed to inquire into the details of the conflict.

Mr. Martinez has shown on the record “that an actual conflict of interest adversely affected his lawyer's performance.” *Cuyler v. Sullivan*, 446 U.S. 335, 348, 64 L. Ed. 2d 333, 100 S. Ct. 1708 (1980). His lawyers were afraid of him and would not communicate with him. This conflict caused them to make strategically poor decisions by their own admissions and clearly affected the quality of defense counsel’s closing argument and ability to represent Mr. Martinez in further proceedings after the trial. Because of the conflict, Mr. Martinez was deprived of the effective assistance of counsel and is entitled to a new trial with constitutionally conflict-free counsel.

### CONCLUSION

Mr. Martinez respectfully requests that this Court find that the trial court deprived him of his right to effective assistance of counsel by failing to appoint a new attorney who did not have a conflict with him, or to even inquire into the nature of the conflict. He asks the Court to remand for a new trial.

RESPECTFULLY SUBMITTED this 13 day of May, 2011.

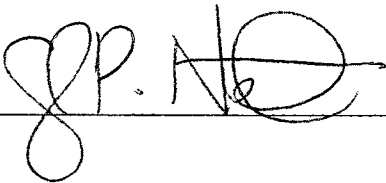
  
\_\_\_\_\_  
SAMUEL P. NEWTON  
Attorney for the Defendant/Appellant

## CERTIFICATE OF SERVICE

I, SAMUEL P. NEWTON, hereby certify that I have caused to be deposited in the United States mail eight copies of the foregoing and an electronic CD of the foregoing to the Utah Court of Appeals, 450 South State Street, Salt Lake City, Utah 84114-0230, and two copies and an electronic CD to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, Third Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 13 day of May, 2011.

  
\_\_\_\_\_  
SAMUEL P. NEWTON

MAILED a true and correct copy of the foregoing and an electronic CD containing the foregoing to the Utah Court of Appeals and the Utah Attorney General's Office as indicated above this 13 day of May, 2011.

  
\_\_\_\_\_

## **ADDENDUM A**

### **Defendant's Pro Se Motion for New Counsel Alleging Ineffective Assistance**

JUN 07 2010

SALT LAKE COUNTY

By

AM

Deputy Clerk

Third Judicial District Court, State of  
Utah Salt Lake County, Salt Lake Department

State of Utah  
Plaintiff

Order to Allow defendant  
New pointed Counsel

vs.

Julio inez Martinez  
Defendant

Case No. 091903723

Judge: Himonas

Julio inez Martinez defendant of record for the  
defendant Julio inez Martinez Motioned the  
Court to allow defendant, New Appointed  
Counsel, by out-side of LDA Attorney  
at Law.

For good Cause

It is Hereby Ordered, that defendant  
be allowed new Counsel by ineffective  
Counsel. By Salt Lake County, State of  
Utah,

Dated this 19th day of May 2010



In the third District Court  
Salt Lake Department In and  
For the County of Salt Lake,  
State of Utah

The State of Utah  
Plaintiff

vs.

Defendant

Julio Inez Martinez

D.O.B 08/07/1977

1523 West 3395 South #C

Sand Utah Otn# 30862/22

County Clerk,  
Motion for ineffective  
Counsel of plan of action  
To Request a new pointed  
L.D.A. on Case No##  
091903723

Defendant Julio Inez Martinez hereby Moves  
the Court for an order that will give defendant  
A new Counsel, Appointed by the State of Utah,  
Defendant,

Has been doing his best effort to  
contact old L.D.A but to No avail nothing  
is furthermore coming by the knowingly attempts.

Defendant

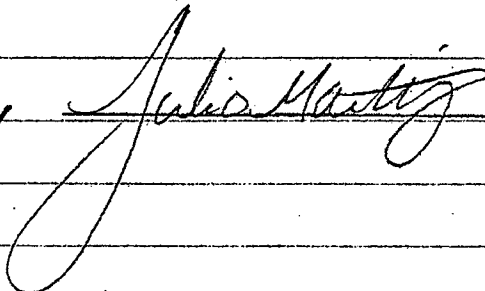
Has ask on previous statements that  
Medical records be appointed to him with in  
his discovery pertaining to him self and  
Victim which is also pertaining to his case and  
furthermore he's being rejective by statement in  
assertion to defendant by Say-E.

Defendant requests a new Counsel, on  
hearing so that defendant can obtain all  
medical records of incident hereto.

Dated this 19<sup>th</sup> day of May 2010

by Julio Martinez

Mailed a copy of the foregoing to the  
Salt Lake County Attorney's Office,  
111 East Broadway, Suite 400, Salt Lake City,  
Utah 84111, on the 19<sup>th</sup> day of May 2010

Sign by 

FILED  
THIRD DISTRICT COURT  
10 JUN -7 PM 12:00  
SALT LAKE DEPARTMENT  
BY DEPUTY CLERK

Third Judicial District Court, State of  
Utah Salt Lake County, Salt Lake Department

State of Utah  
Plaintiff

Order to Allow defendant  
New pointed Counsel

vs.

Julio inez Martinez  
Defendant

Case No. 091903723

Judge: Himanas

Julio inez Martinez defendant of record for the  
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For good Cause

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Salt Lake County Attorney's Office,  
111 East Broadway, Suite 400, Salt Lake City,  
Utah 84111, on the 19<sup>th</sup> day of May 2010

Sign by Julio Martinez

In the third District Court  
Salt Lake Department In and  
For the County of Salt Lake,  
State of Utah

The state of Utah  
Plaintiff

Vs.

Defendant

Julio inez Martinez

D.O.B 08/07/1977

1523 West 3395 South #C

Sand Utah Otn# 30862122

County Clerk,  
Motion for ineffective  
Counsel of plan of action  
To Request a new pointed  
L.D.A. on Case No<sup>#</sup>  
081903723

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Anew Counsel, Appointed by the State of Utah.  
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contact old L.D.A but to No avail nothing  
is furthermore coming by the knowingly attempts.  
Defendant

Has ask on previous statements that  
Medical records be appointed to him with in  
his discovery pertaining to him self and  
Victum which is also pertaining to his Case and  
furthermore he's being rejective by statement in  
assertion to defendant by Say-E.

JUN 04 2010

SALT LAKE COUNTY

By \_\_\_\_\_ Deputy Clerk

Third Judicial District Court, State of  
Utah Salt Lake County, Salt Lake Department

State of Utah  
Plaintiff

Order to Allow defendant  
New pointed Counsel

vs.

Julio inez Martinez  
Defendant

Case No. 091903723

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Julio inez Martinez defendant of record for the  
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Court to allow defendant, New Appointed  
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Counsel. By Salt Lake County, State of  
Utah,

Dated this 19th day of May 2010

In the Third District Court  
Salt Lake Department In and  
For the County of Salt Lake,  
State of Utah

The state of Utah  
Plaintiff

VS.

Defendant

Julio inez Martinez

D.O.B 08/07/1977

1523 West 3385 South #C

Sand Utah Otn# 30862122

County Clerk,  
Motion for ineffective  
Counsel of plan of action  
To Request a new pointed  
L.D.A. on Case No<sup>#</sup>  
091903723

Defendant Julio inez Martinez hereby Moves  
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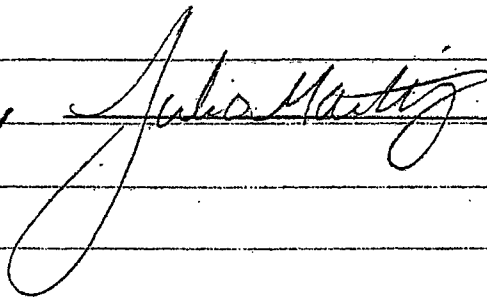


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hearing so that defendant can obtain all  
medical records of incident hereto.

Dated this 19<sup>th</sup> day of May 2010

by Julio Martinez

Mailed a copy of the foregoing to the  
Salt Lake County Attorney's Office,  
111 East Broadway, Suite 400, Salt Lake City,  
Utah 84111, on the 19<sup>th</sup> day of May 2010

Sign by 



## **ADDENDUM B**

### **Rule 1.4, 1.6, 1.7, Rules of Professional Conduct**

**Rule 1.4. Communication.**

(a) A lawyer shall:

(a)(1) promptly inform the client of any decision or circumstance with respect to which the client's

informed consent, as defined in Rule 1.0(e), is required by these Rules;

(a)(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(a)(3) keep the client reasonably informed about the status of the matter;

(a)(4) promptly comply with reasonable requests for information; and

(a)(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

### **Rule 1.6. Confidentiality of Information.**

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(b)(1) to prevent reasonably certain death or substantial bodily harm;

(b)(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interest or property of another and in furtherance of which the client has used the lawyer's services;

(b)(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud and in furtherance of which the client has used the lawyer's services;

(b)(4) to secure legal advice about the lawyer's compliance with these Rules;

(b)(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(b)(6) to comply with other law or a court order.

(c) For purposes of this rule, representation of a client includes counseling a lawyer about the need for or availability of treatment for substance abuse or psychological or emotional problems by members of the Utah State Bar serving on an Utah State Bar endorsed lawyer assistance program.

**Rule 1.7. Conflict of Interest: Current Clients.**

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(a)(1) The representation of one client will be directly adverse to another client; or

(a)(2) There is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(b)(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(b)(2) the representation is not prohibited by law;

(b)(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(b)(4) each affected client gives informed consent, confirmed in writing.